Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	WC Docket No. 10-90
	)	
Connect America Fund	)	
	)	
	)	

To: The Commission

PETITION FOR CLARIFICATION, OR IN THE ALTERNATIVE, RECONSIDERATION

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Hughes Network Systems, Inc. ("Hughes") hereby petitions for clarification or, in the alternative, for reconsideration of the order issued on July 6, 2018 in the above-captioned proceeding establishing performance metrics for recipients of Connect America Fund ("CAF") universal service support.[1] Specifically, Hughes respectfully requests clarification that the "conversational-opinion test" for demonstrating compliance with the requirement that high-latency bidders show a voice-quality Mean Opinion Score ("MOS") of four or higher, as required in the *Metrics Order*, does not apply to CAF support distributed through the New NY York Broadband Program ("NY Program"). In the alternative, Hughes petitions for reconsideration of the application of the conversational-opinion test requirement to recipients of support through the NY Program, pursuant to Section 405 of the Communications Act of 1934, as amended,[2] and Section 1.429 of the Commission's Rules.[3]

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[1] *Connect America Fund*, WT Docket No. 10-90, Order, DA 18-710 at ¶ 44 (WCB, WTB, OET rel. July 6, 2018) ("*Metrics Order*").

[2] 47 U.S.C. § 405.

[3] 47 C.F.R. § 1.429.

I. INTRODUCTION AND SUMMARY

CAF support was awarded in the NY Program in March 2018, four months before the *Metrics Order* was released. In the order authorizing the distribution of CAF support through the NY Program, the Commission stated that high-latency bidders would be required to demonstrate a MOS score of 4 or higher and "should be prepared to submit laboratory testing consistent with International Telecommunication Union recommendations P.800,"[4] which includes a number of testing protocols besides the conversational test. Modifying the testing requirements after the NY Program auction would upset bidders' expectations and undermine the results of the auction. Moreover, it appears that the Commission did not intend for the limitation in the *Metrics Order* on MOS testing to apply to NY Program CAF support recipients because the NY Program is not mentioned in the *Metrics Order*. Hughes urges the Commission to issue a clarification to this effect.

To the extent that the Bureaus intended to apply the conversational standard to CAF support awarded through the NY Program, the Commission or the Bureaus should reconsider that conclusion. In addition to the impact on bidder expectations, a decision in the Metrics Order to limit high-latency bidders in the NY Program auction to only a portion of the ITU-T P.800 recommendation for demonstrating MOS compliance would be contrary to law. Specifically, the Bureau lacked adequate decisional basis to make such a decision, and such a decision would constitute retroactive rulemaking.

[4] *Connect America Fund et. al.*, WC Docket No. 10-90 et al., Order, 32 FCC Rcd 968, 987, n. 135 (2017) ("*NY CAF Order*").

II. THE COMMISSION SHOULD CLARIFY THAT THE CONVERSATIONAL TEST IS NOT REQUIRED FOR RECIPIENTS OF NY CAF SUPPORT

The Commission should make clear that the restriction in the *Metrics Order* limiting high-latency bidders to the use of one portion of the ITU-T P.800 standard—the conversation-opinion test—does not apply to recipients of CAF support awarded through the NY Program.

The *Metrics Order* indicates that it applies to a wide range of high-cost programs, but it does not mention the NY Program. Specifically, the *Metrics Order* states that it applies to "certain recipients of Connect America Fund (CAF) high-cost universal service support, including price cap carriers, rate-of-return carriers, rural broadband experiment (RBE) support recipients, Alaska Plan carriers, and CAF Phase II auction winners."[5] Thus, it appears that it was never the Commission's intention to apply the *Metrics Order* to the NP Program.

Moreover, as noted above, when the Commission announced that it would award support in New York through the NY Program, it stated that high-latency bidders would be required to demonstrate a MOS score of 4 or higher and "should be prepared to submit laboratory testing consistent with International Telecommunication Union recommendations P.800,"[6] which includes a number of testing protocols besides the conversational test. Bidders in the NY Program auction thus reasonably believed that they would be permitted to demonstrate their compliance with the MOS 4 standard using any of the tests laid out in that protocol.

As a result, applying the *Metrics Order* to NY Program recipients would upset the expectations of bidders in an auction that is long concluded. As the Commission has observed, "it is difficult to plan a network deployment not knowing the performance obligations that may

[5] *Metrics Order* at ¶ 1.

[6] *Connect America Fund et. al.*, WC Docket No. 10-90 et al., Order, 32 FCC Rcd 968, 987, n. 135 (2017) ("*NY CAF Order*").

exist at the end of the 10-year term" and "[c]ompetitive bidding is likely to be more efficient if potential bidders know what their performance standards will be before bids are made."[7] It would be even worse to indicate, that NY Program bidders could comply with the entirety of the ITU-T P.800 standard, and then restrict the rule to only part of that standard after the auction.

Given that the *Metrics Order* does not apply by its own terms to the NY Program and would upset NY Program's bidders settled expectation in participating in the auction, the Commission should clarify that recipients of CAF support awarded through the NY Program may demonstrate compliance with the MOS 4 standard using any of the approaches specified in the ITU-T P.800 standard, as specified in the *NY CAF Order*.

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD RECONSIDER ITS DECISION

If the Commission declines to issue the clarification requested above and instead concludes that the Metrics Order was intended to apply to NY Program participants, the Commission should reconsider this decision.

First, as discussed above, restricting the standard after the New York auction would upset bidders' set expectations upon which they formulated their bidding strategy. This would undermine the integrity of the auction process. This is reason enough for the Commission to reconsider its decision.

Second, such a decision would lack any basis in the record. Just six months before the Bureaus released the *Metrics Order*, the full Commission found "that there is insufficient information in the record to specify which of the ITU's recommended options applicants should

[7] *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 5958 ¶ 18 (2016).

be prepared to use to demonstrate an MOS of four or higher."[8] Despite the Commission's conclusion that additional information was needed to resolve this issue, the Bureaus failed to seek further comment. A review of the record in this docket reveals that no new information on the MOS issue was submitted between the Commission's January 2018 order and the *Metrics Order*. As a result, if the record was insufficient for the Commission to reach a decision in January, it remained so in July when the Bureau adopted the *Metrics Order*. The decision was therefore contrary to the APA proscription against agency actions that are "unsupported by substantial evidence"[9] and precedent setting aside agency actions as arbitrary and capricious if the action "is not supported by substantial evidence, or the agency has made a clear error in judgment."[10]

Moreover, the Bureaus' conclusion that the record was sufficient to limit the application of the ITU-T P.800 standard for MOS testing, in the absence of any additional evidence, also represents a "change in course" from the Commission's statement six months earlier, which the agency must justify.[11] The Bureaus offered no justification for their reversal of the Commission's decision that the record was insufficient to support further decisions on MOS testing.[12]

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[8] *January 2018 CAF Order*, 33 FCC Rcd at 1386 ¶ 16.

[9] 5 U.S.C. § 706(2)(a), (e).

[10] *AT&T Corp. v. F.C.C.*, 220 F.3d 607, 616 (D.C. Cir. 2000). *See also Massachusetts v. EPA*, 549 U.S. 497 (2007).

[11] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514, 515 (2009).

[12] The Bureaus' proffered explanation for adoption of the conversational-opinion test—that it is more relevant to real-time applications such as VoIP (*see Metrics Order* at ¶ 44)—is not responsive to the Commission's earlier conclusion that the record was insufficient to make a decision.

Finally, application to NY Program bidders of the *Metrics Order*'s decision to limit MOS testing to only a portion of the ITU-T P.800 standard also would constitute impermissible retroactive rulemaking. Under the APA, agency rules "are prospective in application only"[13] and, unless authorized by Congress in "express terms," courts will decline to uphold the application of retroactive rules.[14] This presumption against retroactive rulemaking is based on the notion that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[15] In determining whether an agency rulemaking is retroactive, courts will look at, among other things, whether the new rule "impose[s] new duties with respect to transactions already completed."[16] Bidders in the NY Program auction entered into contractual commitments with New York State with regard to their ability to perform under New York and FCC rules. The Commission stated in the *New York CAF Order* that high-latency bidders could satisfy their obligation to demonstrate a MOS score of 4 or higher by reference to the ITU-T P.800 standard with no indication on any limitation to only a portion of that standard.[17] As a result, this is not merely a case where "a business under[took] a certain course of conduct based on the current law, and [finds] its expectations frustrated when the law changes."[18] Rather, application of the

[13] *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 388 (D.C. Cir. 1972).

[14] *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). *See also Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 745-46 (D.C. Cir. 1986) ("When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief.").

[15] *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 265 (1994).

[16] *Id.* at 280.

[17] *New York CAF Order*, 32 FCC Rcd at 987 n.135.

[18] *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006).

conversational-opinion test in the *Metrics Order* to NY Program recipients would result in an impermissible new duty with respect to a transaction that had already been completed.

For all these reasons, if the Commission declines to clarify that the *Metrics Order*'s decision to limit MOS testing to only a portion of the ITU-T P.800 standard does not apply to the NY Program, the Commission must reconsider its decision to so limit MOS testing.

IV. CONCLUSION

The Commission should clarify that the *Metrics Order* does not apply to the NY Program, because it does not appear that the Commission or the Bureau ever intended it to, and its application would upset bidders settled expectations. If the Commission declines to issue such clarification, it must reconsider the application of the Metrics Order to the NY Program as its application would be contrary to law.

Respectfully submitted,

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